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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1207

NORMAN B. FROST, Deceased,
and
HARRY DREISEN,

Petitioners,

v.

EXECUTORS OF THE ESTATE OF ARTHUR R. MORRISON,

Respondents.

BRIEF IN OPPOSITION
TO A
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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March 14, 1979

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QUESTIONS PRESENTED

1. Was the judgment of the Court of Appeals so supported by its findings of actual fraud that the law of the case was not a necessary ground of decision (i.e. obiter dictum)?

2. If a due process issue is in fact presented here:

a. Is it constitutionally permissible to apply the doctrine of law of the case to nonparties,

1) who are in privity with the party to the judgment, and acquired their interest in the notes after maturity, after the District Court had stated it would inquire into the Morrison claims to them, and after the filing of the Morrison cross-claim.

2) had notice of the hearing at which the judgment, the effect of which they seek to avoid was given, and

3) in effect resisted being added as parties to that hearing on a motion to join them?

b. Is it constitutionally permissible in applying the doctrine of law of the case to require a District Court to have a rational basis for overturning its earlier judgment, affirmed on appeal, including new evidence justifying a change of position, even from parties added after the original judgment who were:

1) in privity with the party to the judgment, and acquired their interest in the notes after maturity, after the District Court had stated it would inquire into the Morrison claims to them and after the filing of the Morrison cross-claim.

2) had notice of the hearing at which the judgment, the effect of which they seek to avoid, was given, and

3) in effect resisted being added as parties to that hearing on a motion to join them?

STATEMENT OF THE CASE

In 1964, Arthur R. Morrison made a claim in the District Court that he was the beneficial owner of a constructive or resulting trust in two promissory notes in the total face amount of $325,000.00. The notes were made by Do-Mor, Inc., a Florida corporation, and were secured by a mortgage on lands in Brevard County, Florida. The lands had been conveyed by Morrison to what the Court of Appeals for the Fourth Circuit was later to call a "shell" corporation (Petitioners' Appendix, page 63a), wholly owned by one James T. Benn, in May, 1963. Benn sold them to Do-Mor the following month in return for purchase money notes in the amount of $400,000.00.[1]

The claim to the notes was asserted by Morrison in 1964, in the first stage of this proceeding, and the District Court stated in December of that year that it would inquire into that claim. A cross-claim asserting the claim was filed in February 1965. A month earlier Morrison had brought suit in Florida asserting the claim and asking the Florida court to enjoin Do-Mor to pay him the amounts due on its notes.

Morrison died in 1970, before any action was taken in either suit. In the fall of 1970, the District Court set the issue for hearing in March, 1971, and the Florida suit was dismissed.

After Morrison's death, his Executors (hereafter the Estate) discovered that Benn had caused the notes to be assigned to first one and then to another of his wholly owned corporations. The second of these corporations had assigned the notes to a nominee of Norman B. Frost in March of 1965, after maturity and after the Morrison cross-claim had been filed. Frost was a lawyer in Washington, D. C., who was very much acquainted with Benn. Frost later described Benn as a "business associate". He had also done considerable work, paid for by Benn,

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[1] Ownership of the remaining two notes in the face amount of $75,000.00 was not an issue in the proceeding below.

in a suit in which the United States District Court for the District of Columbia had found Benn guilty of fraud, and gross fraud at that. See the opinion in Sankin v. 5410 Connecticut Avenue Corporation, 281 F. Supp. 524 (D.C.D.C. 1968).

During the fall of 1970, the Estate tried to persuade Frost to join voluntarily as a party in the hearing scheduled for March, 1971, together with his own assignee, one Harry Dreisen. When this attempt failed, the Estate filed a motion to show cause why Frost and Driesen should not be joined as parties pursuant to Rule 19 of the Federal Rules of Civil Procedure. The District Court denied the motion with leave to renew it. Frost and Dreisen had notice of the motion and the hearing. (Pet. App. 85a)

In an opinion dated May 4, 1971, the District Court imposed a constructive trust on the Do-Mor notes and Brevard County lands in favor of the Estate against Capital/Benn on the basis of fraud. After reconsideration was denied, this judgment was affirmed on appeals by Capital and Benn in Capital Investors Co. v. Morrison, 453 Fed. 2d 1365 (CA 4 1972).

The Estate thereafter renewed its motion to show cause and, over their objection, the District Court joined Frost and Dreisen as parties in its order of December 16, 1971. The petitioners' statement that they were added as parties after the imposition of the constructive trust is literally correct. Petitioners, however, have preferred not to state that Frost and Dreisen knew of the hearing many weeks before it was held, chose not to join as parties, and later resisted being added as parties when they were, in fact, joined.

After a hearing in early 1972, the District Court ruled that it would not impose a constructive trust in favor of the Estate against Frost and Dreisen. At this hearing, the District Court apparently assumed that its ruling with respect to the constructive trust against Capital/Benn was correct; but it found that Frost and Dreisen had no responsibility for Benn and his doings. (Pet. App. 92a)

The Estate appealed this adverse ruling of the District Court, which was dated August 25, 1973. The Fourth Circuit reversed on the ground that the District Court had failed to apply the provisions of the Uniform Commercial Code which governed the rights of the parties. It ruled that Frost and Dreisen could have no greater right to the notes than their assignor, Benn.

The Estate had contended before the Fourth Circuit that the District Court's ruling that the Estate had a constructive trust in the notes was res judicata as to Frost and Dreisen as parties in privity with Benn, taking after maturity and after Morrison had asserted his claim in the proceeding. The Fourth Circuit conceded that the position of the Estate was supported by precedent. (Pet. App. 70a). The Court, however, thought as a matter of fairness that Frost and Dreisen should be heard again, a second time, on the issue of the constructive trust between Capital/Benn and the Estate. The Court did not, as the petitioner asserts, (Pet. page 4) hold that Frost and Dreisen were not in privity with their assignor. Such a statement would have been a legal absurdity. What the Court did was to decline to apply the legal consequences of the relationship of assignor and assignee as it existed. Having told the District Court that they doubted that Frost was an assignee in good faith on any basis and stated their reasons, (Pet. App. 75a-77a), the panel remanded the case to the District Court to determine if there was a constructive trust on the existing record "supplemented by any evidence either party may submit."

On remand, the District Court heard the parties in the fall of 1974. At that hearing, the Estate submitted additional documentary evidence in proof of Benn's fraud. The petitioners had nothing to add. The record before the District Court consisted only of documents, depositions and transcripts of evidence at a hearing before another and different District Court judge.

On remand, in an opinion dated February 3, 1975, the District Court said nothing about the Uniform Commercial

Code. It had been instructed by the Fourth Circuit that Frost and Dreisen had only Benn's rights. It thereupon, with no new evidence as to Benn's probity and good faith, reversed its earlier holding saying that there was not and had never been any evidence of Benn's bad faith presented to it. Having washed Benn and rehabilitated his character,[2] the District Court found that his assignees had taken the disputed notes free of a constructive trust.

The Estate naturally appealed from this ruling. On appeal, the Fourth Circuit at first affirmed. It then reversed on the Estate's petition for rehearing. It then, on a petition for rehearing by the petitioners, set the case down for reargument. Having heard the parties again, the Court of Appeals on September 29, 1978, issued its opinion reversing the District Court. It ruled the Executors of the Estate "now have a constructive or resulting trust in the Florida land and are entitled to an order requiring the Defendants to convey it to them."[3] Judge Widener, who had written the first opinion on this appeal, dissented.

In its opinion, the Court found "the evidence of Benn's fraud is compelling." (Pet. App. 5a). It stated that:

> "What Benn did amply supports the finding that he never intended that the Capital Investors' notes be paid; he diverted all of Capital Investors' assets and stripped it of all means of payment." (Pet. App. 5a).

The Court, indeed, referred to other indicia of Benn's fraud: that he misrepresented Florida law to avoid giving the security Morrison asked; that he had thereby prevailed on Morrison to

[2]Benn had, among other things, pleaded guilty to a charge of mail fraud in the District of Columbia in 1972.

[3]Frost and Dreisen had foreclosed on the mortgage securing the notes in 1973. The foreclosure was completed several months after Frost's death and title to the lands was taken in the name of his personal representative and Dreisen.

accept unsecured notes of a shell corporation; that of the $225,000.00 he received from the notes he paid Morrison nothing,[4]

It described Benn as "an accomplished fraud artist" and listed certain of his accomplishments:

> "Benn was an accomplished fraud artist. On a plea of quilty, he was convicted in 1971 in the United States District Court of the District of Columbia of fraud by mail. In 1963, the Tax Court found him guilty of tax fraud. T. C. Memo 1963-151. In its opinion, the Tax Court referred to a pattern of acquiring valuable properties largely on the basis of notes which were, or became, worthless and which Benn never intended paying. The kind of complicated schemes in which he engaged are illustrated in the opinion of Judge Jones in Sankin v. 5410 Connecticut Avenue Corporation, D.C.D.C. 281 F. Supp. 524 (1968), in the opinion of Judge Fulton in Walsh v. Continental Insurance Underwriters Inc., (S. D. of Fla. No. 63-576-Civ-CF, 1965) and in the opinion of Judge Hoffman in Freehill v. Benn (E. D. of Va., No. 3421, 1969). He had the capacity of persuading even sophisticated business people to place their trust in him. Though he was not a lawyer, he dealt in legalisms. He convinced Morrison that he was a 'legal genius' and a helping friend. What he did to Morrison, however, was in the pattern disclosed in the court cases." (Pet. App. 5a-6a)

In pointing to Benn's fraud in these reported cases, the Court of Appeals followed the law established in Wood v. U. S., 16 Pet. 342 (1842), that proof of intent to commit fraud may be established by evidence of fraudulent conduct in other instances.

[4]Morrison admitted receiving something around $4,000.00 from Benn. Benn claimed to have paid about $17,500.00 for Morrison's Virginia and Florida lands. But none of these amounts came from the proceeds of the notes in issue.

The Court then summed up by noting:

"When he stripped Capital Investors of its assets and devoted them to his own use without paying the Morrisons, he clearly established that his intention, from the beginning, was not to pay the Morrisons." (Pet. App. 6a)

The Fourth Circuit also pointed out again as it had in 1973 (484 Fed. 2d 1157, 1164, 1165) (Pet. App. 75a), that Benn was no stranger to Frost:

"Frost, about whom the district judge was concerned, was not entirely an innocent, unsuspecting victim of deception. Several reasons for this are catalogued in the opinion reported at 484 F. 2d 1157 at pages 1164 and 1165.[5]. Frost, now deceased, was a reputable lawyer in the District of Columbia, but he knew Benn. His firm represented some of Benn's associates in the *Sankin* case. Indeed, he paid Benn only $100,000 for the two notes, the remaining $50,000 of the price being a credit for legal fees due Frost's firm by Benn's associates, the payment of which Benn had guaranteed. From the factsin the *Sankin* case, Frost was bound to have known the kind of man Benn was." (Pet. App. ibid)

After saying all this, the Court stated:

"Under the circumstances, we think the district judge was required to adhere to his earlier findings and conclusions that a constructive or resulting trust did arise."

The comment was mild and ertainly reasonable. "Under the circumstances," or stated another way, given such powerful evidence of fraud and with no contrary evidence, the Court of Appeals was of the view that the District Court had erred and had no choice but to adhere to its earlier finding of fraud. Petitioners, nevertheless, present this language as raising grave questions of due process and constitutional law.

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5 For the reasons given by the Court of Appeals in this opinion, see Pet. App. 75a, 76a.

REASONS FOR DENYING THE WRIT

1. THE JUDGMENT OF THE COURT OF APPEALS DID NOT DEPEND ON THE LAW OF THE CASE.

There is no necessity for this Court to decide the due process issue in upholding the judgment of the Court of Appeals.

The decision by Judge Kellam in the District Court was made on a record consisting only of documents, depositions and transcripts of testimony at a hearing before another judge. The Court of Appeals was not even bound by the clearly erroneous rule. Munters Corp. v. Burgess Industries, 535 Fed. 2d 210 (C. A. 2, 1976); Dopp v. Franklin Bank, 461 Fed. 2d, 873 (C. A. 2, 1972). It was free to consider the evidence and to arrive at its own judgment thereon. It was, of course, free to make its own legal conclusions.

The opinion, as quoted above, clearly states that the Court of Appeals found the evidence of fraud on the part of Benn overwhelming. There was, moreover, nothing to establish Benn's good faith in his dealings with Morrison, no evidence of his probity, nothing to challenge the conclusion that he had been engaged in a scheme to steal Morrison's property from the outset. With such proof of fraud the conclusion that Benn took and held Morrison's property as a constructive trustee followed as a necessary conclusion and the Court of Appeals so held.

The reversal of the District Court's ruling by the Court of Appeals was justified on the record before it. The observations of the Court of Appeals as to the law of the case were consequently in the nature of obiter dicta and unnecessary to support its judgment. That being so, the case presents no issue of due process and Fifth Amendment rights.

2. IN THE CIRCUMSTANCES, THE APPLICATION OF THE LAW OF THE CASE RAISED NO CONSTITUTIONAL ISSUE

Assuming for the purpose of argument that the judgment of the Fourth Circuit depended on the application of the law of the case to the issues before it, its application raised no issue of due process or violation of Fifth Amendment rights to justify the granting of the requested writ of certiorari.

Rule 19 of the Court sets out in general terms the kind of questions and issues that justify the granting of a petition for certiorari. None of the provisions of the Rule is in point here. The ruling by the Fourth Circuit is, if anything, in line with the law laid down by this Court in a similar case. Lamb v. Cramer 285 US 217 (1932). The petitioners have referred to no conflict between the circuits in any decisions on the issue presented. The supposed issue is not something new with which this Court has never grappled before, *Lamb v. Cramer*, supra, and which demands consideration and settlement now.

As noted, the issue presented here would seem to have been dealt with and disposed of in *Lamb*, decided almost two generations ago. There Lamb was an attorney to whom a client had conveyed certain property while her creditors were seeking to impose their claims against it. Judgment was eventually given for the creditors, with the Court reserving judgment as to Lamb's rights as grantee. When the creditors sought to have Lamb held in contempt for refusing to turn over the disputed property to them, the District Court ruled in Lamb's favor, on his plea, apparently, that he had not been a party to the action between his grantor and the creditors. The Fifth Circuit reversed, saying Lamb was bound by the judgment in favor of the creditors as a matter of res judicata. This Court affirmed on the ground that Lamb was in privity with his grantor and the judgment which determined her rights was binding on him.

Justice Stone, in the opinion, showed no sign of having misgivings on due process grounds in holding Lamb bound by the judgment.

It would seem to the Estate that *Lamb* disposes of the petitioners' case. Like Lamb, they were in privity with their assignor and took only his rights, as the Fourth Circuit had held in its opinion in 1973. (Pet. App. 69a). It is true that the Fourth Circuit denied the Estate the effect of res judicata. But in holding the petitioners subject to the more limited effect of the law of the case the Circuit could not be said, in light of the decision in *Lamb*, to have denied them due process. The application of res judicata, which the decision in *Lamb*, would have justified, would have limited the rights of the petitioners far more than the application of the doctrine of the law of the case. And if res jusicata, could be applied to a non-party to the judgment in *Lamb*, without violating his constitutional rights, application of the law of the case to the petitioners was a fortiori permissible.

But if *Lamb* does not dispose of the petitioners' case, there is nevertheless no sound basis for the petitioners' assertion that they were denied due process by the Court of Appeals.

This Court, in a number of cases in recent years, has extended the effect of estoppel by judgment in the interest of what is called judicial economy. Blonder-Tongue Laboratories, Inc., v. University of Illinois Foundation, 402 U. S. 313, 329 (1971), Parklane Hosiery Co., v. Shore, 47 U. S. L. W. 4079 (January 9, 1979). In these cases, this Court has shown its disposition to prevent parties from relitigating what has already been settled. Here Frost and Dreisen chose not to take part in the 1971 hearing. Had the decision then been adverse to the estate, they would undoubtedly have taken shelter behind it. They had notice of, but stayed away from, that hearing. Can they by staying away from the proceeding at that time avoid the effect not only of res judicata and estoppel by judgment, but of the law of the case as well?

The answer seems plain. To say that an issue of due process is involved seems to stretch the concept of due process beyond any reasonable or recognized limit.

The fact is that it is difficult to formulate the petitioners' idea of what would constitute due process in their situation. They refer to Pennoyer v. Neff, 95 U. S. 714 (1878). But they show not even the most remote cousinship to *Pennoyer*. They were properly added as parties over their protest late in 1971. They were heard not once but twice on their rights. Nor is there any kinship between them and the objecting parties in Hansberry v. Lee, 311 U. S. 32 (1940), which they cite. The disputed judgment here was given against Benn. Frost was Benn's assignee, after maturity and after the filing of the Morrison cross-claim. Dreisen holds his half interest in the notes by assignment from Frost. By any known definition they were in privity with Benn, who was bound bythe judgment that there was a constructive trust, a judgment which was affirmed on appeal. Application of the law of the case in such circumstances was a minimal burden on the petitioners. And it was a minimal protection to the Estate, which was, as already noted, normally and properly entitled to the protection of res judicata.

The only definite suggestion of the petitioners as to how application of the law of the case denied them due process is in their footnote 8 on page 11 of the petition:

> "As recognized by the dissenting Circuit Judge, the application of 'law of the case' in the instant case 'shifts the burden from Morrison's Estate, to prove its case as the proponent, to the defendants Frost and Dreisen to prove incorrect previous fact findings in a case to which they were not parties.' " (Pet. App. 12a)

Their point is, apparently, that after the Estate carried its burden of proof and received judgment in 1971, affirmed on appeal, it should have had to bear that burden again against them. They take the view that the judgment, even after being upheld on appeal, should have been treated as a nulity in the same case and

on the same issue. They complain at being obliged to prove that the earlier judgment was wrong. It may be easy to understand their complaint but it can scarcely be "elevatd to a constitutional level", to use this Court's phrase in United States v. Augenblick, 393 U.S. 348, 355 (1969). Indeed, in United States v. Tehan 365 Fed. 2d 191 (C. A. 6 1966) cert. denied, 385 U. S. 1012, it was held that there was no denial of due process in shifting the burden of proof to a party defending a charge of having violated the Ohio Blue Sky Law and requiring him to prove that the securities he sold were exempted from the provisions of that statute. The second hearing in which the petitioners took part was certainly fair. No right was denied them. There was no violation of any express constitutional mandate. Petitioners point to no case holding that a shift of the burden of proof in a civil trial violates due process. The Estate knows of none. And to require parties seeking to reverse a judgment to prove error in the judgment seems a thoroughly reasonable procedure. A presumption that a court always errs surely runs counter to every principle of jurisprudence recognized in the courts and that would appear to be what the petitioners ask this Court to hold.

It may also be that the petitioners are asserting that they were indispensable parties to any resolution of the dispute between Benn and the Estate in 1971 and that the judgment was consequently invalid without them. But strictly speaking, the issue as to the constructive trust between Benn and the Estate could be resolved only on evidence of the dealings between Benn and Morrison and between Benn and Morrison's Estate after his death. The petitioners at the first hearing, in 1972, in which they took part, went to great lengths to disassociate themselves from Benn's dealings and asserted only their own individual rights, independent of Benn's. But if they are now saying that they were indispensable parties to the hearing in 1971, it is clear that they made no effort to join in the proceeding and make their case at that time. Had they sought to do so, they had a procedure

available under Rule 19 of the Federal Rules of Civil Procedure, and could have appealed their exclusion from the hearing, had the District Court, in fact, chosen to exclude them.

The petitioners can scarcely argue that the law of the case is inherently unconstitutional and by its nature denies due process to the parties to whom it applies. The doctrine is not a novelty of the law, unknown to the petitioners at the time of the remand and invented thereafter. As the Fourth Circuit carefully stated, the doctrine is discretionary at most. It correctly pointed out that the doctrine does not prevent the doing of justice. It spelled out the reasons why it did not view Frost as the victim of any injustice. The reference to the want of new evidence was a correct statement of a bsic element involved in determining whether to overturn a judgment which has become the law of the case. Moreover, it should be said that no one barred the petitioners from introducing evidence of Benn's good faith in dealing with Morrison at each of the hearings in which they took part. They did not produce such evidence because none existed. There was nothing available to impeach the correctness of the District Court's holding in 1971 that Benn had engaged in a scheme to get Morrison's property without paying him for it.

What Frost and Dreisen are asking this Court to hold is that a District Court is free to overturn its own judgment, affirmed on appeal, without any basis in the record to justify such a change. If that were so, the provisions in the Federal Rules dealing with judgments would be without meaning. The powers of a District Court to alter its judgment are carefully stated in Rules 59 and 60 of the Federal Rules of Civil Procedure. The position taken by the petitioners would allow a District Court to overturn its judgment without any rational basis if attacked collaterally, even by a party in privity with the party to the original judgment.

In fact the petitioners go beyond that. Their contention is that as parties in privity with Benn, they were denied due process unless the District Court could change its 1971 judgment at its

discretion and without regard to the fact that its judgment has been affirmed on appeal. That leads, obviously, to another question: If a District Court may disregard a decision affirming its judgment, why may it not disregard a decision on appeal which reverses its ruling? The result which the petitioners ask would be to make judicial anarchy and disorder an essential element of due process.

The truth is that the doctrine of the law of the case does no more than insure a modest element of stability in thejudicial process. Lincoln National Life Insurance Company v. Roosth 306 Fed. 2d 110, 113, 114 (C. A. 5 1962). It leaves courts free to correct their past errors when justice requires. It allows parties to present evidence toward that end. It normally and reasonably requires new facts to justify changing a judgment; but it permits a change without such evidence when the interest of justice requires.

Looked at from a distance, it would seem that the petitioners gambled in 1971 on a decision in favor of Benn. Having lost that gamble and having lost in their attempt to establish rights superior to Benn's they now claim as a matter of due process that they are entitled to have the District Court overturn its 1971 judgment, though affirmed on appeal, with nothing to justify such a change. Their plea is, in short, that arbitrary action by the District Court is an indispensable part of due process.

The position of the Estate would be the reverse of the petitioners. The Estate would say that to allow such arbitrary action by a District Court would be to deny due process and to destroy any trace of order in the judicial system.

For the reasons stated, the Executors ask that the petition for certiorari be denied.

Respectfully submitted,

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